AFFIN BANK BHD

v.

JALALUDDIN JAFFAR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: D4-22-809-2000]
18 APRIL 2008

BANKING: *Banker and customer - Overdraft facility - Default in repayments - Claim for amount outstanding - Whether customer given sufficient notice of change of interest rate - Whether proper use of customer's address - Whether prior demand made on customer before commencement of suit - Whether bank agreed to withhold legal proceedings on condition being fulfilled*

The defendant defaulted in repayments of an overdraft facility granted by the plaintiff bank to the defendant in the sum of RM1,000,000 and that led to the filing of the plaintiff's present suit against the defendant in court. The defendant raised the following issues: (1) whether the plaintiff gave sufficient notice of the change of interest rate; (2) whether there was proper use of the defendant's address of "Damansara Heights" in the plaintiff's statement of account as opposed to "Bukit Damansara" in the plaintiff's letter of offer; (3) whether it was necessary for the plaintiff to have made a prior demand before commencing the suit against the defendant; and (4) whether there was an agreement to withhold legal proceedings on condition the defendant remit the sum of RM1.9 million by a stipulated date.

Held (in favour of the plaintiff):

(1) There was no clause on the mode of service of the notice as to whether it should be served by AR Registered post, registered post or ordinary post. Although the plaintiff was unable to show proof of posting specific to the case, it was confirmed that it was the usual practice of the plaintiff that such letters would be posted by ordinary mail. There was no other evidence adduced by either party as to why the plaintiff would treat communication with the defendant in any way different from its other customers. Therefore, it was accepted that the notice was served by ordinary mail. (para 4)

(2) Since there was no restriction as to how service was to be effected, any method of service might be employed. Therefore, it might be served by ordinary mail. Ordinary mail was a common and generally reliable system for delivery of letters to any address. It was reasonable to expect that in the ordinary course of mail the

A recipient would have received the mail. It was therefore, not enough to assert that the notice was not received to displace the expectation that the defendant would have received the notice by ordinary post in the ordinary course. To do so, there must be some evidence that there had been occurrences where mail addressed to that address B had not been received. No such evidence was produced. The court, therefore, accepted that the notices were delivered to the defendant. (para 5)

(3) It was in evidence that the defendant himself had used the description "Damansara Heights" and therefore contradicted his own C objection that it ought to be "Bukit Damansara". The challenge to the description "Damansara heights" showed that his objection was frivolous and vexatious. The defendant was clutching at straws for defences and it detracted upon the overall credibility of his defences for only a person who did not believe he had a good defence would D resort to clutching at straws. The objection to the use of "Damansara Heights" instead of "Bukit Damansara" must therefore fail. (paras 8 & 9)

(4) The defendant was the principal borrower and not a guarantor. There was no "on demand" clause in this case. It was therefore E not necessary that a demand be made to the defendant prior to commencement of legal proceedings. It was sufficient that the actual amount be determined at trial. (para 11)

(5) There was no question of there being an agreement between the F parties that the plaintiff withhold legal proceedings on condition that the defendant remitted the sum of RM1.9 million by the stipulated date. There was no evidence that the said sum was paid. As such, that question did not arise. It followed that the submissions on behalf of the defendant that the original agreement had been replaced G did not arise for consideration. (paras 17, 18, 19 & 20)

[Judgment for the plaintiff in the sum of RM487,696.54 and costs.]

Case(s) referred to:

Hong Leong Finance Bhd v. Tiara Etika (M) Sdn Bhd [2003] 5 CLJ 18 HC ***(refd)*** H

National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Sabah Credit Corp v. Wilayah Fabrication Sdn Bhd & Ors [2005] 7 CLJ 33 HC ***(refd)***

The Development Bank of Singapore Ltd v. Heng Holdings SEA (Pte) Ltd & Ors [2000] 2 SLR 493 ***(refd)*** I

For the plaintiff - Allen Miranda; M/s AI Nathan & Isa Aziz Ibrahim
For the defendant - Satvinder Kaur; M/s Muhammad Ganesan & Nazri

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] At the request of the defendant Jalaluddin bin Jaffar, and *vide* a letter of offer dated 16 September 1996, Affin Bank Berhad, the plaintiff, agreed to grant to the defendant overdraft facilities amounting to RM1,000,000. The security for this loan as stated in cl. 8 of the letter of offer was to be a 1st party pledge of a fixed deposit for RM500,000 for which a memorandum of deposit and letter of set-off is to be executed. The defendant signified his acceptance by appending his signature on the 5th page of the letter of offer.

[2] Upon the defendant defaulting on his repayment of the overdraft facility, the plaintiff, through its solicitors M/s A.I. Nathan & Isa Aziz Ibrahim, issued a letter of demand on 23 March 2000. The defendant failed to pay the sum demanded and the plaintiff proceeded to file this present action in court.

[3] In challenging the plaintiff's claim to the sum to be repaid, the defendant questioned whether the plaintiff had given sufficient notice of the change of interest rate. The parties had agreed as follows:

> The Bank reserves the right to revise and vary the interest rate(s) and/ or BLR at its sole discretion by a notice to you in writing and the amended rate(s) shall take effect from the date specified in the said notice.

[4] There was, however, no clause on the mode of service of this notice as whether it should be served by AR Registered post or by registered post or by ordinary post. Although the bank was unable to show proof of posting specific to this case, PW4 confirmed that it was the usual practice of the bank that these letters would be posted by ordinary mail. There was no other evidence adduced by either party as to why the plaintiff would treat communication with the defendant in any way different from other customers. The court accepts that the notice was served by ordinary mail.

[5] There being neither a deeming provision as to service nor a required mode of service agreed to between the parties, the question was raised whether posting by ordinary mail was sufficient service. Since there is no restriction as to how service was to be effected, any

A method of service may be employed. Thus, it may be served by ordinary mail. Ordinary mail is a common and generally reliable system for delivery of letters to any address. It is reasonable to expect that in the ordinary course of mail the recipient would have received the mail. It is, therefore, not enough to assert that the notice was not received to
B displace the expectation that the defendant would have received the notice by ordinary post in the ordinary course. To do so there must be some evidence that there has been occurrences where mail addressed to that address had not been received. No such evidence was produced. The court, therefore, accepts that the notices were delivered to the
C defendant.

[6] The defendant took issue with the use of the address of "Damansara Heights" in the plaintiff's statement of account in pp. 53 until 57 of Bundle B as opposed to "Bukit Damansara" as it appears in the letter of offer at p. 1 of Bundle B.

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[7] The address in the statement of account read "No. 37, Jalan Setiaraya, Damansara Heights, 50490 Kuala Lumpur". The address in the letter of offer read "No. 37, Jalan Setiaraya, Bukit Damansara, 50490 Kuala Lumpur". The book "Poskod Malaysia" issued by Pos
E Malaysia Berhad shows that the post code for Jalan Setiaraya is "50490 Kuala Lumpur". The defendant's own answer at question number 51 is:

> 51. A: ... it was followed by a letter from my personal financier Maybank *vide* letter dated 4.9.2001. The address stated therein is"... Damansara Heights.

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[8] The defendant himself used the description "Damansara Heights" and contradicts his own objection that it ought to be "Bukit Damansara".

[9] Court proceedings are not occasions for a party to stage, by raising various issues, a series of contests, so that the other party
G succeeds in his claim only if he can overcome the challenges. Frivolous challenges are a waste of time and resources, serving only to delay, for they will, as they should, ultimately fail; and should they succeed, it would lead to injustice. Frivolous challenges are an abuse of the process of the courts which is provided to ensure that the courts get the facts
H right to enable it to deliver justice. The challenge to the description "Damansara Heights" shows that his objection is frivolous, even perhaps vexatious. It certainly shows that the defendant is clutching at straws for defences and it detracts upon the overall credibility of his defences for only a person who does not believe he has a good defence would
I resort to clutching at straws. The objection to the use of "Damansara Heights" instead of "Bukit Damansara" must, therefore, fail.

[10] Likewise, the objection on the service of the plaintiff's letter of demand as at pp. 21 until 23 of bundle B must fail. A

[11] An issue was raised as to whether it is necessary for the plaintiff to have made a prior demand before commencing the suit against the defendant. The defendant is the principal borrower and not a guarantor. There is no "on demand" clause in this case. It is, therefore, not necessary that a demand be made to the defendant prior to commencement of legal proceedings. It is sufficient that the actual amount be determined at trial. See *Hong Leong Finance Bhd v. Tiara Etika (M) Sdn Bhd* [2003] 5 CLJ 18; *Sabah Credit Corp v. Wilayah Fabrication Sdn Bhd & Ors* [2005] 7 CLJ 33. B C

[12] There is a series of letters dated 25 April 2001, 18 May 2001, 7 June 2001 and 7 September 2001 between the parties. A question was raised as to whether these letters constitute a concluded settlement agreement. D

[13] PW3 had testified:

14. Q: Did you make any oral representations to the defendant?

14. A: Outside the letters referred to at pages 36, 37 and 40 of CBD, as far as I am aware, neither I nor any other officer of the Plaintiff, made any oral representations to the Defendant. I wish to add that the Defendant is fully aware that as a Bank, any negotiations for settlement must be approved by the Bank's Board of Directors. That is why we asked the Defendant to put down their proposal in writing. Please see page 24 of CBD at paragraph 1 and page 34 of CBD at paragraph 3. Similarly, the Bank's replies are in writing. Please see pages 36, 37 and 40 of CBD. E F

15. Q: Was there a concluded agreement for settlement?

15. A: No, there was not. Salutary Vision's letter of 25.4.2001, at the 2nd page, at paragraph 2, page 25 of CBD, states "We would like to propose ...". Similarly, Orienasli's letter of 18.5.2001, 1st page, paragraph 3, page 34 of CBD states "... we would like to propose ..." G

These were all proposals. There wasn't a concluded agreement. In any event, as stated above, the Defendant failed to make the payment of 1.9 million by 29.6.2001. H

[14] In *The Development Bank of Singapore Ltd v. Heng Holdings SEA (Pte) Ltd & Ors* [2000] 2 SLR 493, the learned judicial commissioner said: I

I do not discount the possibility that Tay might have said something at the 30 September meeting that could have given the impression that the plaintiffs were prepared to hold their hands on the matter for a while. But the question is whether it was communicated in such a

manner as to give the impression that it was a binding commitment. If it were, then this impression would surely have operated on the minds of the first defendants' representatives at the time. And when the plaintiffs manifested any sign of reneging on this agreement, one would have expected that the first defendant would complain about it in writing as they had every right to be indignant. Yet there was no such allegation in the contemporary correspondence. Ang and Heng in their affidavits had given evidence that Heng orally complained to lay about such an event. On 2 October 1998 KWP wrote two letters to the first defendant threatening to commence legal proceedings unless the first defendants made full payment within seven days. Ang and Heng said in their affidavits that Heng telephoned Tay to complain that the latter had acted wrongly and prematurely. They said that Jay apologized and explained that it was due to a miscommunication with KWP. He told them to ignore the letter. But in the first defendant's letter dated 30 October, there was no mention of the oral agreement or any breach of good faith on the part of the plaintiffs. I accept that the first defendants might not want to step on any toes at this stage. But the problem is that at every stage after this, they still refused to make reference to the oral agreement. On 13 November 1998, there is again no mention of the oral agreement, only this hopeful sentence:

> We trust that you will advise your lawyers to hold their hands and that the interest element of our account be reduced where possible.

On 20 November 1998, KWP wrote to the first defendants to deny allegations made in their letter of 10 November which is not exhibited. At the last paragraph of KWP's letter, they state:

> In any event, please be informed that with respect to your letter of 13 November 1998, our clients will be proceeding with legal action against you, and all our clients' rights against you are reserved.

Again there was no mention of the oral agreement. The first time that the first defendants made any allegation in writing of the oral agreement was when they filed their defence on 27 January 1999. In my view, the total lack mention of the oral agreement in the contemporary records further corroborates the plaintiffs' contention that there was no such undertaking given by Jay. In the circumstances, I had no doubt that the evidence clearly showed that the oral agreement as alleged by Ang was a sham defence and designed to delay judgment.

[15] The terms of the letters do not support the interpretation that there was an agreement. There is no communication between the parties produced to show that the defendant had asserted to the plaintiff that there was a concluded agreement between both parties, or that the plaintiff had reneged on such agreement. The court concludes there was no agreement.

[16] PW3 had testified as follows:

> 9. Q: Was the Bank agreeable to this proposal?
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> 9. A: No. The Bank informed the defendant *vide* letter dated 7.6.2001 that the Bank is not agreeable to the defendant's proposal. This letter can be found at page 36 of CBD. Furthermore, in this same letter at the 3rd paragraph, the Bank placed on record that, as informed by the defendant, the defendant was expecting some funds from the Kuching Prison Integrated System project of about RM1.9 million by 29th June, 2001 and that these funds will be utilized to settle part of the outstanding Trust Receipts. The Bank requested the defendant to follow-up closely with the main contractor/ awarding party for the release of the above-said funds by 29th June 2001.
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> 10. Q: Did the defendant pay the Bank this sum of RM1.9 million by 29.6.2001?
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> 10. A: No. The defendant did not.

[17] The above relates to a question whether there was, alternatively, an agreement to withhold legal proceedings on condition the defendant remitted the sum of RM1.9 million by 29 June 2001.

[18] In *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC it was held:

> A contingent condition, as we have already referred it, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other.

[19] There being no evidence that the sum had been paid, the question of agreement to withhold legal proceedings does not arise.

[20] In the light of the above, the submissions on behalf of the defendant that the original agreement had been replaced does not arise for consideration.

[21] In the circumstances, the court entered judgment for the plaintiff in the sum of RM487,696.54 and costs.